Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MARC D. BLACKMAN, personally and in his capacity as a partner in the law firm of RANSOM, BLACKMAN & WEIL, formerly known as RANSOM, BLACKMAN & SIMSON,

Petitioners,

v.

UNITED STATES OF AMERICA and CHERYL J. BUTCHER, Internal Revenue Service Revenue Agent,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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71 pp

QUESTION PRESENTED

Does a State's right to protect the privacy interests of its citizens by specifically directing that the attorneys it licenses "maintain inviolate the confidence, and at every peril to the attorney, preserve the secrets of the client" affect the manner in which an attorney complies with a federal revenue regulation that generally requires "any person engaged in a trade or business" to make a return to the Internal Revenue Service that would reveal such information?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit are those in the caption.

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OPINIONS BELOW

The decision of the District Court for the District of Oregon is set out at App.A. The District Court simultaneously issued an Opinion in *United States v. Sepenuk*, 864 F. Supp. 1002 (D. Or. 1994) and incorporated portions of that opinion into its decision in this case. The *Sepenuk* Opinion appears at App.B.

The decision of the Court of Appeals for the Ninth Circuit in *United States v. Blackman* is reported at 72 F. 3d 1418 (9th Cir. 1995). The Court's Opinion is set out at App.D.

BASIS FOR JURISDICTION

The decision of the Court of Appeals was entered on December 29, 1995. A Petition for Rehearing and Suggestion for Rehearing En Banc was filed on February 12, 1996. This Petition was denied on March 13, 1996. App.E. This court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS

Or. Rev. Stat. §9.460(5):

> An attorney shall:
>
> * * *
>
> (5) maintain inviolate the confidence, and at every peril to the attorney, preserve the secrets of the clients of the attorney.

26 U.S.C. § 6050I:

> (a) Any person–
>
> (1) who is engaged in a trade or business, and
>
> (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),
>
> shall make the return described in subsection (b) with respect to such transaction (or related transactions at such time as the Secretary may by regulations prescribe.
>
> (b) A return is described in this subsection if such return–
>
> (1) is in such form as the Secretary may prescribe,

(2) contains–

(A) the name, address, and TIN of the person from whom the cash was received,

(B) the amount of cash received,

(C) the date and nature of the transaction, and

(D) such other information as the Secretary may prescribe.

STATEMENT OF THE CASE

Blackman is a graduate of Harvard College and the Yale Law School, has been a member of the Oregon State Bar since 1973, and is admitted to practice before this Court, the United States Court of Appeals for the Ninth Circuit, the United States District Courts for the Districts of Oregon, Arizona and Southern Florida, the United States Tax Court, and the Court of Claims. App. J 1-2. Following a clerkship with then-Oregon Supreme Court Chief Justice Kenneth J. O'Connell, he served as an Assistant United States Attorney from 1974 to 1978. *Ibid.* He has been in private practice since 1978. He served as president of the Multnomah Bar Association [serving the greater Portland, Oregon metropolitan area] 1992-93. At the times pertinent to this proceeding, a substantial potion of Blackman's practice has been as a criminal defense lawyer. *Ibid.*

On four occasions between 1987 and 1991, Blackman's firm received cash in excess of $10,000 in connection with the rendition of legal services to clients of the firm. App.I 3, App.J 3-4. When Blackman filed currency transaction reports [frequently referred to as Form 8300 or CTRs] regarding these receipts with the Internal Revenue Service, he withheld the clients' identity and the specific purpose for which the funds

were received. In virtually every case, the funds did not represent fees, but property linked to the very legal service his firm was retained to perform. App.J 2-3; *In camera* Affidavit.[1]

In addition to withholding client information, Blackman set out on the forms the reasons he was doing so, which included the statutory obligation of an Oregon attorney to maintain "the confidence" and "the secrets" of his clients "inviolate" "at every peril to" the attorney. App.J 4.[2]

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[1] Blackman provided an *in camera* Affidavit in the District Court setting forth the specific circumstances under which his firm received the funds and the specific legal services it was retained to render. The Ninth Circuit held that this was the appropriate manner in which to proceed and that both it and the trial court properly "reviewed these documents." *United States v. Blackman*, 72 F. 3d 1418, 1425 (9th Cir. 1995). A Motion to file this Affidavit under Seal is being submitted to the Court simultaneously with this Petition.

[2] Before the IRS, the district court and the Ninth Circuit, Blackman advanced the contention that neither the text nor legislative history of 26 U. S. C. §6050I supplanted the attorney-client privilege and that his firm's receipt of cash was so inextricably linked to the legal services for which it was retained that the withheld information constituted confidential communications within the attorney-client privilege.

The government first summoned Blackman to produce the withheld information on April 11, 1990. App.J 3-5. On May 14, 1990 Blackman appeared and explained why he could not make a further substantive response. His reasons included Or. Rev. Stat. §9.460(5), as construed in *State v. Keenan/Waller,* 307 Or 575, 771 P. 2d 244 (1990), which clarified that Oregon lawyers were obligated to "maintain inviolate...at every peril to the attorney, the secrets of the clients of the attorney" and gave broad scope to what constituted a "secret." *Ibid.*

The IRS did not seek to enforce this summons. By July, 1991, Blackman concluded that the IRS had acquiesced in his position. App.J 5. Therefore, in 1991 he agreed to provide legal services to a client which arose, in part, from the client's possession of more than $10,000 cash. *Ibid; In camera* Affidavit. Blackman

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The government's response was that the statute "trumps" the privilege. *See United States v. Blackman, supra* at 1426. The Ninth Circuit concluded that it did not need to resolve this issue on the factual record before it. *Ibid.* Therefore, though the interplay between the statute and the privilege is an important issue, it is not independently presented in this petition. A brief on the merits, however, will likely need to address this question.

informed the client that although a CTR would be filed by his firm disclosing its receipt of this cash, the IRS was not requiring disclosure of the client's identity or the specific nature of the services to be rendered and this information would be withheld. *Ibid.*

On July 7, 1992, Blackman was served with another summons. It was indistinguishable from the first. App. I, J. On August 19, 1992, Blackman appeared as directed and again set forth the reasons that he was prohibited from responding. App.J 5-6.

Nearly two years later, in February, 1994 the IRS initiated a summons enforcement proceeding in the United States District Court for the District of Oregon. App.D 3. The district court issued an Order to Show Cause to which Blackman responded by public and *in camera* Affidavits and written memorandum. The trial court consolidated Blackman's case with one involving Norman Sepenuk, another criminal defense attorney practicing in Portland. App.A 2. Thereafter, the court issued opinions and orders rejecting their fundamental challenges and granting enforcement of most of the summonses' demands. App.C 1.

Blackman timely appealed to the Ninth Circuit, which affirmed on December 29, 1995. App.D. A Petition for Rehearing and Suggestion for Rehearing En

Banc was filed on February 12, 1996. On March 13, the court issued an order denying this Petition. App.E 1.

REASON FOR GRANTING THE WRIT

This case presents an important question of law regarding the right of a state to protect the privacy interests of its citizens by specifically mandating that the attorneys it licenses shall "maintain inviolate the confidence, and at every peril to the attorney, preserve the secrets of the client" and the interaction of this right with a federal revenue regulation that in general terms requires "any person engaged in a trade or business" to make a return that would reveal information defined as "the secrets of the client" by state law.

This Court as recently as 1995 reiterated the primary role played by the States in the regulation of the professions and the substantial interest the States have in protecting the privacy of their citizens:

> On various occasions we have accepted the proposition that "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar,* 421 U. S. 773, 792, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975); *see also Ohralik* [*v. Ohio State Bar Assn.,* 460 U. S. 447] at 460, 56 L. Ed. 2d 444, 98 S. Ct .1912 [(1978)]; *Cohen v. Hurley,* 366 U. S. 117, 124, 6

> L. Ed. 2d 156, 81 S. Ct. 954 (1961). Our precedents also leave no room for doubt that "the protection of potential clients' privacy is a substantial state interest." *See Edenfield* [*v. Fane,* 507 U. S. ____] *supra,* at _____, 123 L. Ed 2d. 543, 113 S. Ct. 1792. In other contexts, we have consistently recognized that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown,* 447 U. S. 455, 471, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). Indeed, we have noted that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Frisby v. Schultz,* 487 US 474, 484-485, 101 L Ed 2d 420, 108 S Ct 2495 (1988).

Florida Bar v. Went For It, Inc., ___ U. S. ___, 132 L. Ed. 2d 541, at 550, 115 S. Ct. 2371 (1995).

The Court has also recognized the special interests the States have regarding the regulation of lawyers:

> ...[T]he State bears a special responsibility for maintaining standards among members of the licensed professions. *See Williamson v. Lee Optical Co.,* 348 U. S. 483, 99 L. Ed. 2d 563, 75 S. Ct. 461 (1955); *Semler v. Oregon State Board of Dental Examiners*, 294 U. S. 608, 79 L. Ed. 1086, 55 S. Ct. 570 (1935). "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice,

> and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar,* 421 U. S. 773, 792, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975). While lawyers act in part as "self-employed businessmen," they also act "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes." *Cohen v. Hurley,* 366 U. S. 117, 124, 6 L. Ed. 2d 156, 81 S. Ct. 954 (1961).

Ohralik v. Ohio State Bar Assn., 460 U. S. 447, 460, 56 L. Ed. 2d 444, 98 S. Ct .1912 (1978).

At all times relevant to this matter, Oregon implemented these compelling interests by imposing on lawyers by statute a mandatory duty to "maintain inviolate the confidence, and at every peril to the attorney, preserve the secrets of the clients of the attorney." Or. Rev. Stat. 9.460(5). The Oregon Supreme Court gave substantive meaning to this statute in *State v. Keenan/Waller*, 307 Or. 515, 771 P. 2d 244 (1989), holding that by prohibiting an Oregon lawyer from revealing client "secrets," it mandated client protection both qualitatively and quantitatively greater than that provided by the attorney-client evidentiary privilege:

> The obligations on which [Attorney] Waller based her refusal to answer are of two kinds. One is the evidentiary attorney-client privilege....The second is the obligation to maintain a client's secrets that is recognized in ORS 9.460(5) and in Canon 4 of the Code of

Professional Responsibility, further defined in DR 4-101(A). The provisions are not coextensive. The professional obligation to "preserve" the client's secrets "at every peril to the attorney," ORS 9.460(5), first codified in Oregon's Deady Code of 1865 following the Field Codes of New York and California, is not limited to the attorney's position as a witness. Canon 4, as DR 4-101(A) spells out, does not confine the client's "secrets" to communications; indeed, they may reach the attorney from someone other than the client. The Model Rules of Professional Conduct proposed by the American Bar Association in 1983 would forbid a lawyer to "reveal information relating to representation of a client," which the commentary explains as including "all information relating to the representation, whatever its source." Model Rules of Professional Conduct, Rule 1.6, comment (1987). *See also* Wolfram, Modern Legal Ethics 297-8 (1986). However this broad rule might be applied to various problems, the fact that it reflected a majority's rejection of more qualified recommendations of the ABA's Kutak Commission shows that one cannot dismiss a literal reading of statutes like ORS 9.460(5) as unthinkable.

To hold that, except for the rules of evidentiary privilege, the general obligation to testify overrides an attorney's professional obligation of secrecy would be too facile where, as in Oregon, the professional obligation is statutory law. The statute would, of course, yield to an accused's constitutional right to the lawyer's testimony. In other cases, if the lawyer is under subpoena, the two demands

> on the lawyer call for harmonizing ORS 9.460(5) with conflicting statutes as far as possible. *See* ORS 136.555 et seq; ORCP 55; ORS 1.010 and 1.020.

Id. at 518-519 [emphasis added]

The scope of the court's construction of "secret" is clear from its endorsement of the decision by the Washington Supreme Court in *Seventh Elect Church of Israel v. Rogers*, 102 Wash. 2d 527, 688 P. 2d 506, 510-11 (1984), in which that court held that information about how a client paid his lawyer, though not a "confidence," was a "secret" not subject to disclosure.

In contrast to the explicit statutory duty imposed on Oregon lawyers by Or. Rev. Stat. §9.460(5), Congress established reporting requirement in only themost general terms when it enacted 26 U. S. C. § 6050I, which provides in relevant part:

> Any person–
>
> > (1) who is engaged in a trade or business, and
> >
> > (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),

> shall make the return described in subsection (b) with respect to such transaction (or related transactions at such time as the Secretary may by regulations prescribe.

There is nothing in the legislative history of 26 U. S. C. §6050I that suggests that Congress intended it to abrogate or preempt State statutes regulating the legal duties of attorneys. Indeed, there was no discussion at all regarding the effect §6050I might have on the practice of law. Neither the American Bar Association, the National Association of Defense Lawyers nor any other criminal defense organization was heard at the hearings or when the vote was taken.[3] Congressional

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[3] In *United States v. Goldberger & Dubin, PC,* 935 F. 2d 501 (2d Cir 1991) the Second Circuit stated that . . . "Congress's rejection of the lobbying efforts to secure a specific exclusion of the legal profession from this customary definition [of trade or business] is strong evidence that Congress did not wish to do so." 935 F. 2d at 506. This statement has no basis in fact; it appears to be the product of bad legislative history research. 26 U. S. C. §6050I was enacted in 1984. There were no discussions preceding this enactment regarding the effect §6050I might have on the legal profession. That issue did not surface until hearings held in 1985. Those hearings never led to any Congressional action. *See* Ellen S. Podgor, *Form 8300: The Demise of Law as a Profession*, 5 Georgetown Journal of Legal Ethics, No. 3 (Winter 1992) 485 at 505. Thus, all that can be said about these hearings is what the Supreme Court said in

silence on this matter cannot be construed as an intent to abrogate. *See Tennessee Valley Authority v. Hill,* 437 U.S. 153, 189-192, 98 S.Ct. 2279, 57 L.Ed. 2d 117 (1978); *Rembold v. Pacific First Federal,* 798 F. 2d 1307 (9th Cir. 1986), *cert. denied* 482 U.S. 905, 107 S.Ct. 2480, 96 L.Ed. 2d 373 (1987). On the contrary, as this Court noted in *Hillsborough County v. Automated Med. Labs.*, 471 U. S. 707, 85 L. Ed. 2d 714, 105 S. Ct 2371 (1985):

> "Where . . . the field that Congress is said to have pre-empted has been traditionally occupied

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Tennessee Valley Authority v. Hill, 437 U.S. 153, 189-192, 98 S.Ct. 2279, 57 L.Ed. 2d 117 (1978) about committee hearings regarding the impact of the Endangered Species Act on the Tellico Dam Project held after the Court of Appeals had issued its decision finding the Act to apply:

> It is true that the *Committees* repeated their earlier expressed "view" that the Act did not prevent completion of the Tellico Project. Considering these statements in context, however, it is evident that they " 'represent only the personal views of these legislators,'" and "however explicit, [they] cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Regional Rail Reorganization Cases*, 419 U. S. 102, 132, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974).

437 U. S. at 193.

> by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Jones v. Rath Packing Co.*, 430 U. S., at 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S., at 230, 91 L. Ed. 1447, 67 S. Ct. 1146) (citations omitted). *Cf. Kassel v. Consolidated Freightways Corp.*, 450 U. S. 662, 670, 67 L. Ed. 2d 580, 101 S. Ct. 1309 (1981) (deference to state regulation of safety under the dormant Commerce Clause; *id.* at 681, n 1, 67 L. Ed. 2d 580, 101 S. Ct. 1309 (Brennan, J., concurring in judgment) (same); *id.* at 691, 67 L. Ed 2d. 580, 101 S. Ct. 1309 (Rehnquist, J., dissenting) (same)...[Hence, for a pre-emption claim to succeed in such a setting, there must be] a showing of implicit pre-emption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that stateand local regulation of health and safety matters can constitutionally coexist with federal regulation.

Id. at 715.

Nothing in the terms or legislative history of 26 U. S. C. §6050I meets any of these criteria. Yet, in its decision in this matter, the Ninth Circuit dismissed Blackman's argument as if Or. Rev. Stat. §9.460(5) constituted nothing more than "a local rule of professional ethics" that falls before the "federal

common law of privilege." *United States v. Blackman, supra* at 1424. This analysis displayed a gross misapprehension both of Oregon law and the power of a State to regulate lawyers "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes." *Cohen v. Hurley, supra* at 124, 6 L. Ed. 2d 156, 81 S. Ct. 954 (1961); *Ohralik v. Ohio State Bar Assn.*, supra *at* 460, 56 L. Ed. 2d 444, 98 S. Ct .1912 (1978).

The existence of Or. Rev. Stat. §9.460(5) imposed not only on Blackman, but also on all courts, the obligation to harmonize the duties imposed by it and 26 U. S. C. § 6050I. Because there is no basis for concluding that Congress intended to preempt the law governing attorneys' performance of their duties or to abrogate State law establishing such duties, the Ninth Circuit improperly concluded that 26 U. S. C. § 6050I entitled the Internal Revenue Service to compel Blackman to violate Or. Rev. Stat. §9.460(5).

This Court should grant this Petition to correct this error and hold that Blackman's manner of filing the currency transaction reports properly reconciled the competing legal duties imposed by State and federal law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

David B. Markowitz,
Ronald H. Hoevet,

Counsel for Petitioner

APPENDICES

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	Civil No. 94-758-MA
Petitioner,	)	
	)	
v.	)	
	)	
MARC D. BLACKMAN,	)	ORDER
	)	
Respondent.	)	

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MARSH, Judge

Petitioner filed this motion to enforce an IRS summons which seeks to discover the identities of clients who engaged in cash transactions of over $10,000 with respondent. Respondent filed four forms 8300 with the IRS reporting cash transactions of over $10,000. The forms are incomplete in that they failed to disclose the name and other identifying information of either the payor or the person on behalf of whom such payments were made. Immediately prior to oral argument on this and a similar petition in United States v. Sepenuk, Civ. 94-758-MA, respondent filed a motion for an evidentiary hearing. Respondent later supplemented this request with an alternative motion to permit questioning via a sworn deposition.

In a separate opinion issued on this date in United States v. Sepenuk, Civ. 94-758-MA, I denied respondent's motion for an evidentiary hearing and addressed many of the same issues raised by the parties in this action. For the reasons set forth more fully in that pinion, respondent's request for a hearing and/or further discovery is also denied. In addition, to the extent that respondent's objections to the petition parallel those raised by the respondent in Sepenuk, those objections are denied for the reasons set forth in that

opinion.[1] Similarly, because the subpoena issued in Sepenuk mirrors the subpoena issued in this case, my ruling regarding the overbreadth of request #4 also applies to the present petition.

However, one significant issue raised with this petition and not addressed in Sepenuk relates to the respondent's claim that two of the questioned transactions do not involve fee arrangements. Respondent argues that disclosure of these transactions would, as in Baird v. Koerner, 279 F. 2d 623 (9th Cir. 1960), reveal the ultimate motive of litigation which the attorney-client privilege is designed to protect.

First, I note that the statute requiring disclosure applies to "cash transactions" generally. 26 U.S.C. § 6050I. Assuming, without deciding, that I may base this decision upon respondent's in camera submission without injustice to the government, I have reviewed the two non-fee related transactions described in respondent's petition. As to the first non-fee related transaction identified, I find that respondent has failed to establish that the transfer of funds related in any direct way to the purpose for which respondent was retained.

---

[1] Respondent Blackman raises the same constitutional and state procedural claims as those raised in Sepenuk, with the addition of a claim that enforcement of the petition might implicate his own Fifth Amendment rights against self-incrimination. I reject this constitutional claim for the reasons set forth in Sepenuk and because the subpoena requests only documents and not testimony.

As to the second non-fee related transaction, I find that respondent has failed to establish that the temporary transfer of funds to his account constitutes a "confidential" communication. I further find that respondent has failed to establish that disclosure of this transaction would disclose the ultimate motive of the litigation or provide an affirmative or last link in any ongoing investigation.

Conclusion

Based on the foregoing, the government's request number 4 is quashed. I further find that disclosure of the names, addresses, taxpayer I.D. numbers, and social security numbers of clients and/or third party payors (to the extent these are in the possession of the respondent) and any information relative to amounts and the general nature of the transaction (i.e. cash for services) are not privileged and must be disclosed. Accordingly, the government's petition to enforce IRS summons (#1) is GRANTED as to items #1-3 and 5 and DENIED as to item $3 and petitioner's motion for additional discovery (#27) is DENIED.

DATED this 2nd day of August, 1994.

/s/ Malcolm F. Marsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	Civil No. 94-758-MA
Petitioner,	)	
	)	
v.	)	
	)	
NORMAN SEPENUK,	)	OPINION
	)	
Respondent.	)	

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MARSH, Judge

Petitioner filed this motion to enforce two IRS summonses which seek to discover the identities of clients who engaged in cash transactions of over $10,000 with respondent. Respondent filed seven forms 8300 with the IRS reporting cash transactions of over $10,000. The forms are

incomplete in that they failed to disclose the name and other identifying information of either the payor or the person on behalf of whom such payments were made. Respondent provides that the seven forms relate to six clients and that the cases of four of those clients are now completed. Respondent has agreed to complete the forms as to the four past clients, but resists compliance with the subpoena insofar as it relates to forms which involve two existing clients.

Immediately prior to oral argument, a respondent in a similar action, United States v. Blackman, Civ. No. 94-20-MA, filed a motion for an evidentiary hearing which this respondent joined in. The motion seeks the opportunity to examine, either at a court hearing or sworn deposition, Special Agent Cheryl Butcher regarding the IRS' motivation in seeking to enforce the disputed subpoenas. At oral argument, the government opposed the request and I set a briefing schedule to permit the parties to address whether further discovery would be necessary. Upon review of those submission and the case law cited, I find that in the exercise of my discretion, cross-examination of Agent Butcher would be inappropriate in this case due to the lack of a preliminary showing of bad faith or harassment. United States v. Samuels, Kramer and Co., 712 F.2d 1342, 1347-48 (9th Cir. 1983); and United States v. Church of Scientology of California, 520 F.2d 818, 822-23 (9th Cir. 1975).

Accordingly, the primary issues presented with respondent's objections to the IRS' motion to enforce summonses are as follows:

(1) Has the government failed to follow all of the requisite procedures to file this petition? Specifically, must the government first obtain a "John Doe," subpoena from the court?

(2) Do "special circumstances" exist to excuse the respondent's failure to comply with the government's subpoena--and if so, may the respondent establish special circumstances through an ex parte submission to the court?

In addition, respondent raises numerous arguments under the state ethical code and the First and Sixth Amendments of the Constitution on his own behalf and on behalf of his clients. Similar arguments have been expressly rejected by every court that has considered them.[1]

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[1] See United States v. Goldberg v. Dubin, 935 F.2d 501, 503 (2nd Cir. 1991) (rejecting challenge under 4th, 5th & 6th Amendments as well as attorney-client privilege doctrine); and United States v. Leventhal, 961 F.2d 936, 937 (11th Cir. 1992); see also In Re Grand Jury Subpoena, 906 F.2d 1485 (10th Cir. 1990) (disclosure of fee arrangement does not violate 6th Amendment right to counsel). Although the constitutional issues under § 6050I have not been directly addressed by the Ninth Circuit, the court has noted in similar circumstances that an attorney could not assert a Fifth Amendment defense to disclosure of fee information on behalf of his client because the privilege is "personal." In Re Grand Jury Appearance of Michaelson, 511 F.2d 882, 889 (9th Cir. 1979).

As for any claim that disclosure might violate state law,

1. Procedure & the John Doe Subpoena

Title 26 U.S.C. § 6050I provides that any person engaged in a trade or business must file a form 8300 for any cash transaction (single or multiple related) that exceed $10,000. Form 8300 is divided into three parts: part I requires disclosure of information identifying the individual from whom the cash payment as received; part II requires disclosure of the nature of the transaction. Congress incorporated section 6050I in the Tax Reform Act of 1984 and in so doing, rebuffed "extensive lobbying efforts to exempt attorneys from the reach of this amendment." See Goldberger & Dublin, 935 F.2d at 503.

Title 26 U.S.C. § 7602(a) empowers the IRS to serve a summons on any person without prior judicial approval, if the information sought is necessary to ascertain that person's tax liability. The government may seek to enforce such a summons pursuant to 26 U.S.C. § 7402(b) and 7604(a). See e.g. Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 312-313 (1985). If the IRS seeks information regarding the potential tax liability of an unnamed taxpayer, it must first obtain prior judicial approval through ex parte procedures

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since the adoption of the Federal Rules of Evidence, courts have uniformly held that federal common law of privilege, not state law, applies. Goldberger, 935 F.2d at 505; Dole v. Milonas, 889 F.2d 885, 889, n.6 (9th Cir. 1989).

pursuant to § 7609(f). This procedure is referred to as a third-party records custodian summons or the "John Doe" summons. Id., at 314, n.4.

In Tiffany, the IRS sought to obtain the names of licensees from a holding company for subsidiaries promoting tax shelters. The respondent argued that the IRS' primary purpose was to audit licensees and thus, the IRS had to comply with the John Doe summons procedure. The IRS submitted affidavits arguing that, although the focus of its investigation was to "ascertain the correctness" of returns filed by the respondent, it might make further inquiry into tax liabilities for licensees identified during the audit. Id., at 314-315. Like the mixed motive cases in the context of "pretextual" stops in the criminal law area, the Court held that the admitted existence of a potential dual motive did not trigger John Doe summons requirements so long as the trial court found ":as a matter of fact" that the IRS was "pursuing a legitimate investigation" of the respondent's tax liability. Id., at 318-19, 323-24, citing United States v. Powell, 379 U.S. 48 (1964). Under Powell, to enforce a summons under § 7602(a), the IRS must show that the investigation will be conducted pursuant to a legitimate purpose, the inquiry may be relevant to that purpose, the information sought is not already within the IRS' possession and that the administrative steps required by the Code have been followed.

In this case, Agent Cheryl Butcher has submitted declarations in which she claims that she is investigating the

respondent's compliance with section 6050I for the years 1987-1992. She explains that relative to this investigation, she seeks to "(1) ascertain the correctness of the incomplete Form 8300 information returns; (2) make Forms 8300, if necessary, where none have been filed; and (3) determine the liability, if any, of the respondent penalties." Butcher specifically disclaims that she is investigating the liability of anyone other than the respondent and notes that she knows "nothing about the unnamed clients except that they paid the respondent over $10,000 in cash. " Finally, she concedes that any information gathered as part of her investigation of respondent may "be used to initiate investigations of the unnamed clients or third parties," but denies that any identifying information could form the "last link" in any ongoing investigation.

Respondent argues that I should disregard Agent Butcher's declaration and find that the IRS' purpose in issuing the summonses is obviously directed against his clients based upon the nature of the IRS' request and argues further, that there is no nexus between the items sought by the IRS and its claimed objective of ascertaining his potential tax accounting and/or liability. The government counters that it has the right, pursuant to the Code and regulations, to confirm the accuracy of any and all information reported on the 8300 forms and that it is therefore justified in its request to that end.

In Tiffany, the Supreme Court declined to disturb the trial court's acceptance of a very similar proffer of legitimacy from an IRS agent. Id., at 318, n.5. The Court noted that "by

definition, the IRS is not engaged in a 'fishing expedition' when it seeks information relevant to a legitimate investigation of a particular taxpayer. In such cases, the incidental effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws." Id., at 322. Respondent relies upon an unpublished district court decision to support an inherent suspicion of the IRS' motives.[2]

2. Special Circumstances

Once the party seeking disclosure has met the initial burden of showing that it has a legitimate interest in the information requested, the individual asserting the privilege must demonstrate that the conditions of the Baird rule are satisfied. United States v. Hodge, 548 F.2d 1347, 1353 (9th Cir. 1977), citing Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

The attorney-client privilege against disclosure generally does not apply to either the identity of a client or to information regarding the amount paid for legal services or the form of such payment. In Re Horn, 976 F.2d 1314, 1317 (9th Cir. 1992). Two related but equally limited exceptions to this general rule exist if disclosure of the identity of the client

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[2] Respondents also submitted a partial transcript of a hearing in which a United States District Judge for the Southern District of New York stated on the record that he found that the IRS' claimed dual purpose was a "sham." See Respondent's "Appendix" at p. A-9. Because the basis for this statement is not clear from the record submitted, I do not consider it as persuasive or even helpful authority.

would "convey information which ordinarily would be conceded to be part of the usual privileged information between attorney and client" or provide a "last link" in an existing chain of incriminating evidence likely to lead to the client's indictment. Id., citing, Baird, 279 F.2d at 632; see also United States v. Gray, 876 F.2d 1411, 1415 (9th Cir. 1989) (explaining last link doctrine), cert. denied, 495 U.S. 930 (1990).[3]

Baird, several clients engaged an attorney for advice on tax matters and on the attorney's recommendation and with his assistance, anonymously tendered sums due for unpaid taxes to the IRS. The IRS then sought the identity of the clients even though no government investigation was pending into the tax liability of those clients. The Ninth Circuit held that the general rule that a client's identity is not protected by the attorney-client privilege was inapplicable when the identification would convey "information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client." Id.,., at 633. Thus, in Baird, the clients' anonymity was a critical part of the basis for the retention of the attorney's services.

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[3] One court has noted the possibility of an "affirmative link" exception-- that is, where disclosure might not provide the F.2d 1118, 1124 (5th Cir. 1990), cert. denied, 499 U.S. 959 (1991).

Following this decision, many courts misstated the law under Baird by focusing upon whether the information sought might "incriminate" the client. See e.g. United States v. Sherman, 627 F.2d 189 (9th Cir. 1980). In In Re Grand Jury Subpoenas, 803 F.2d 493 (9th Cir. 1986), corrected by, 817 F.2d 64 (9th Cir. 1987), the court specifically "disavowed" many of its own decisions following Baird emphasizing that the "relevant inquiry is not whether disclosure of the fee payor's identity would be incriminating or would lead to further grand jury indictments, but rather whether the requisite fee information represents a confidential professional communication." Id., at 496, see also Dole, 889 F2d at 889.

The rule enunciated in Baird has been described as a "narrow exception" applicable only in those "exceptional circumstances" in which disclosure would be tantamount to disclosure of a confidential communication. Gray, 876 F.2d at 1415-16. Numerous attempts to extend Baird have failed. See e.g. Id, at 1416 (declining to extend Baird to attorney called to testify about noticed in hearing regarding client's failure to appear for sentencing); In Re Grand Jury, 803 F.2d at 496 (attorneys must identify third party paying fees absent showing that third party sought personal legal advice). Further, although no specific standard of proof necessary to sustain a Baird exception has been enunciated, the court has held that "generalized speculation" will be insufficient. Dole, 889 F.2d at 889.

The government raises a valid objection to the in camera affidavits which have made it impossible for them to respond in fairness to respondent's claim of privilege. Under Hodge, respondents bear the burden of establishing the applicability of the Baird exception and I find that respondent has clearly failed to meet this burden on the open record.

I have, however, reviewed the in camera submission filed by respondent and find that it fails to justify either exception to the general rule that the identity and fee arrangement of a client is not privileged. At most, respondent has demonstrated that disclosure might lead to future investigations that might incriminate his clients. Respondent has not shown that disclosure would provide a "last link" to an ongoing investigation or that his clients' identities of fee arrangements constitute exceptional privileged "communications."

One concern I do have however, relates to the breadth of the subponas. Specifically, I note that request Number 4 calls for "Any other identifying date for the individual(s) or organization(s) who conducted the transaction(s) or for whom the transaction(s) was conducted." In Horne, the court held that a grand jury subpoena directed against a criminal defense attorney was impermissibly overbroad where it requested "any records or documents reflecting or relating to any thing of value paid or tendered for legal services" or any documents relating to trust accounts. 976 F.2d at 1317-1318.

For example, in Horne, the court noted that letters of consultation and retainer agreements describing the intended scope of the attorney-client relationship could reveal the client's motivation for seeking legal representation and thus, such a demand constituted an "unjustified intrusion into the attorney-client relationship." Id., at 1318.

Respondent may well possess documents which contain both confidential privileged information and identifying data if request Number 4 is broadly construed. Because identifying data is already requested in items numbered 1-3, I find that request number 4 is overly broad in scope and duplicative given the limited nature of the government's inquiry and threatens an unwarranted intrusion into potentially confidential attorney-client communications.

Conclusion

Based on the foregoing, the government's request number 4 is quashed. I further find that disclosure of the names, addresses, taxpayer I.D. numbers, and social security numbers of clients and/or third party payors (to the extent these are in the possession of the respondent) and any information relative to amounts and the general nature of the transaction (i.e. cash for services) are not privileged and must be disclosed. Accordingly, the government's petition to enforce IRS summons (#1) is GRANTED as to items #1-3 and

5 and DENIED as to item #4; and respondent's motion for an evidentiary hearing (#25) is DENIED.

DATED this 2nd day of August, 1994.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	Civ. No. 94-757MA
	)	
v.	)	
	)	
MARC BLACKMAN,	)	JUDGMENT
	)	
Respondent.	)	

Based on the record,

IT IS ORDERED AND ADJUDGED the government's petition to enforce IRS summons (#1) is GRANTED as to items #1-3 and 5 and DENIED as to item #4 and petitioner's motion for additional discovery (#27) is DENIED.

DATED this 3rd day of August, 1994.

Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA; CHERYL J. BUTCHER, IRS REVENUE AGENT,	)
Petitioners-Appellees,	) No. 94-35990
v.	) D.C. No. CV-94-00757-MFM
MARC D. BLACKMAN, personally and in his representative capacity as a partner of Ransom, Blackman & Weil, formerly known as Ransom, Blackman & Simson,	) OPINION
Respondent-Appellant.	)

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
November 13, 1995 - Portland, Oregon

Filed December 29, 1995

Before: James R. Browning, Pamela Ann Rymer and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson

OPINION

T.G. NELSON, Circuit Judge:

Attorney Marc Blackman, personally and in his capacity as partner in the law firm of Ransom, Blackman & Weil, appeals the district court's order granting the petition of the Internal Revenue Service ("IRS") to enforce a summons served on Blackman pursuant to the Internal Revenue Code, 26 U.S.C. §§ 7402(a) and 7604(a) ("I.R.C." or "the Code"). The IRS seeks information to complete several Internal Revenue Service Forms 8300 filed by Blackman in 1987, 1988, and 1991 pursuant to I.R.C. § 6050I. We have jurisdiction under 28 U.S.C. § 1292, and we affirm.

FACTS AND PROCEDURAL HISTORY

I.R.C. § 6050I requires a person receiving more than $10,000 in cash during a single trade or business transaction to file IRS Form 87300, providing the name, address, occupation and social security number of the payor, along with the date and nature of the transaction and the amount involved. The instant dispute concerns four such forms filed by Blackman, a partner in the Portland, Oregon, law firm of Ransom, Blackman & Weil, in 1987, 1988 and 1991. The forms were essentially complete save for information identifying the client-payors and the nature of the services rendered by Blackman or his firm in exchange for the cash. The IRS served a summons on Blackman in 1990 and again in 1992 asking for information to complete the forms. On both occasions, Blackman appeared before the IRS and refused to

supply the information, claiming attorney-client privilege and his duty to maintain client confidences and secrets under Oregon law.

In February, 1994, the IRS initiated an enforcement proceeding against Blackman in the federal district court. The court issued Blackman an Order to Show Cause, in response to which Blackman filed a memorandum and two affidavits, one of which was under seal. After hearing oral argument on June 23, 1994, in a proceeding consolidated with one involving Norman Sepenuk, another criminal defense attorney, the trial court granted enforcement of the IRS summons. Blackman timely appealed.

The district court incorporated portions of its opinion in *United Stats v. Sepenuk*, 864 F.Supp. 1002 (D. Or. 1994), in its order of August 5, 1994, disposing of Blackman's case. We refer to the *Sepenuk* opinion as it applies to Blackman.

ANALYSIS

1. John Doe summons

As noted *infra*, I.R.C. § 6050I provides that any person engaged in a trade or business must file a form 8300 for any cash transaction (or two or more related transactions) in excess of $10,000, 26 U.S.C. § 6050I. Form 8300 requires disclosure of information identifying the payor, and any agent conducting the cash transaction on the part of the payor, as well as the amount and nature of the transaction. The IRS is empowered to serve a summons on any person from whom it seeks information necessary to ascertain that

person's tax liability. 26 U.S.C. § 7602(a). It may seek to enforce the summons through the jurisdictionally appropriate federal district court. 26 U.S.C. §§ 7402(b). 7604(a).

If, however, the IRS seeks information regarding the potential tax liability of an *unnamed* taxpayer, it may not summarily issue a summons, but must follow the procedures laid out in 26 U.S.C. § 7609. If the unnamed taxpayer is known to the IRS, it must provide him or her with notice and opportunity to intervene pursuant to 26 U.S.C. § 7609(a) and (b). Where, however, "the IRS *does not know* the identity of the taxpayer under investigation, advance notice to that taxpayer is, of course, not possible." *Tiffany Fine Arts, Inc. v. United States,* 469 U.S. 310, 316-17 (1985) (emphasis in original). In such cases, the IRS must obtain judicial approval pursuant to § 7609(f) prior to issuing a summons. *Id.* at 317; 26 U.S.C. § 7609(f). A summons issued pursuant to § 7609(f) is also known as a "John Doe summons." *See id.* at 313 n.4.

To create a prima facie case validating the summons, the IRS must show the investigation has a legitimate purpose, that the inquiry is relevant to that purpose, that the information sought is not already in the possession of the IRS, and that it followed all requisite administrative steps. *United States v. Powell,* 379 U.S. 48, 57-58 (1964). The IRS need only make a minimal showing with regard to these elements. United States v. Abrahams, 905 F.2d 1276, 1280 (9th Cir 1990). Declarations by the investigating agent suffice as to the first

and second elements. *Id.* After the case is made, a "heavy burden" falls upon the respondent to disprove the IRS's assertions. *Id.* (quotations omitted).

We review for clear error the district court's ruling that the IRS has met the requirements for enforcement of its summons. *Abrahams,* 905 F.2d at 1280. "Review under the clearly erroneous standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'" *Concrete Pipe & Prod. v. Construction Laborers Pension Trust,* 113 S. Ct. 2264, 2280 (1993). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Service Employees Int'l Union v. Fair Political Practices, 955 F.2d 1312, 317 n.7 (9th Cir), *cert. denied*, 112 S. Ct. 3056 (1992).

Blackman argues that the IRS is really seeking information about his clients, and is not seriously investigating him or his law firm at all. He contends that the information sought by the IRS "can have absolutely no relevance to any legitimate investigation" of himself or the firm, and urges that the IRS be required to follow John Doe procedures. The IRS claims it is only investigating Blackman and not his clients, though it conceded in reference to Sepenuk that any information it acquires as a result of its investigation may be used to initiate investigation of unnamed clients or third

parties. *See Sepenuk*, 864 F. Supp. at 1005. We must decide whether the IRS was required to obtain judicial approval prior to serving a summons on Blackman.

The Supreme Court held in *Tiffany* that even where the IRS admits it has a "dual motive"--that is, that its investigation is aimed at unnamed as well as named persons--a John Doe summons is not required, so long as the trial court determines as a matter of fact that the IRS's investigation of the named party is legitimate. 469 U.S. at 317-18, 324. Thus, even if the IRS were investigating Blackman's clients as well as Blackman himself, which it denies, it would not be obliged to follow John Doe procedures.

Blackman insists, however, that the IRS is *solely* interested in hi clients, and asks the panel to consider the following out-of-circuit decisions: *United States v. Ritchie*, 15 F. 3d 592 (6th Cir.) *cert. denied*, 115 S. Ct. 188 (1994); and *United States v. Gertner*, 873 F. Supp. 729 (D. Mass. 1995), *aff'd in part*, 65 F. 3d 963 (lst Cir. 1995).

The *Ritchie* court held that because the district court's conclusion that the law firm's clients were the real and *sole* focus of an IRS summons directed at the firm was "not clearly erroneous," the IRS should have used the John Doe procedure. [1] 15 F. 3d at 599-600. As the district court here

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[1] The *Ritchie* court deemed that the facts of the case did not necessitate requiring the IRS to start all over, but warned the IRS that in the future, "if it cannot demonstrate a bona fide interest in investigating the tax liability of the party

noted, the trial court in *Ritchie* reached its conclusion on the basis of evidence that the IRS had assured members of the law firm it was not investigating them or their firm. *See Sepenuk*, 864 F. Sup. at 1005 (citing *United States v. Ritchie*. Civ. 3-92-610 (E.D. Tenn. Sept. 15, 1992).

In *Gertner*, the district court found that the IRS's interest in the law firm under investigation was "pretextual" and that the IRS was in fact only interested in the law firm's clients. 873 F. Supp. at 734. The court concluded the Government should have used the John Doe procedure, but held it was unnecessary for the IRS to thus proceed because the information it sought was protected by the attorney-client privilege, and thus inaccessible to the Government. *Id.*

The First Circuit affirmed on circumscribed grounds. Finding that the district court's determination of the IRS's motives was not clearly erroneous, it held that the IRS was required to comply with John Doe procedures. *See Gertner*, 65 F. 3d at 970. It deemed irrelevant the remainder of the district court's decision, including its discussion of attorney-client privilege. *See id.* at 971-74 (holding that the district court's discussion of privilege was either "surplusage" or the result of "miscalculat[ion]": "Any way we look at the situation, the district court's views as to the applicability vel non of the attorney-client privilege are not necessary to the result.

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summoned, it must comply with § 7609(f)." 15 F. 3d at 600.

Consequently, we have no occasion to consider [their] correctness.").

In both *Ritchie* and *Gertner*, the courts of appeal held the John Doe procedure was necessary based on the district courts' supportable findings that the IRS's investigation of the named parties was illegitimate. In the present case, by contrast, the district court found the investigation of Blackman and his firm to be legitimate under *Powell*. *See Sepenuk*, 864 F.Supp. at 1005. The district court concluded that the IRS had established its prima facie case as to both Blackman and Sepenuk, and held that neither Blackman or Sepenuk had produced evidence to show that "the IRS' purported bases for this summons are a sham or that he is not in fact the actual target of this investigation." *See id.*, F. Supp. at 1006.

In the absence of compelling evidence to support Blackman's allegations concerning the IRS's motives for its investigation, we hold the district court's finding of legitimacy was not clearly erroneous and affirm that the IRS was not required to follow John Doe procedures in serving its summons upon Blackman.

2. Attorney-client privilege

We review *de novo* the district court's rulings on the scope of the attorney-client privilege as they involve mixed questions of law and fact. *Clarke v. American Commerce National Bank*, 974 F.2d 127, 130 (9th Cir. 1992). The burden of proof is on the party seeking to establish that the privilege applies. *Id.* at 129. The district court correctly noted

that "since the adoption of the Federal Rules of Evidence, courts have uniformly held that federal common law of privilege, not state law applies." *See Sepenuk*, 864 F.Supp. at 1004 n.1; *Clarke*, 974 F2d at 129 ("Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law") (citing *United States v. Zolin*, 491 U.S. 554, 562 (1989); Fed. R. Evid. 501).

Blackman argues that the issue is not just one of privilege, however, but also of duty. According to Blackman, Oregon Revised Statute § 9.460(5), in effect at all relevant times, not only codifies the attorney-client privilege, but also imposes a positive duty upon the lawyer to avoid disclosure of his client's confidences and "secrets."

This argument is specious. Because the attorney-client privilege protects the client, not the attorney, *see, e.g., Abrahams*, 905 F.2d at 1283 n.9, it necessarily entails a duty by the attorney to keep his client's confidences, or secrets, as the (former) Oregon statute provides. Oregon law's explicit spelling out of this duty did not thereby create an exception to the federal common law of privilege.

The Eighth Circuit recently considered a similar argument and concluded that "Congress cannot have intended to allow local rules of professional ethics to carve out fifty different privileged exemptions to the reporting requirements of 26 U.S.C. § 5060i." *United States* v. *Sindel*, 53 F. 3d 874, 877 (8th Cir. 1995). We agree with this conclusion and

accordingly consider Blackman's claims under the federal common law of privilege.

As a general rule, client identity and the nature of the fee arrangement between attorney and client are not protected from disclosure by the attorney-client privilege. *Ralls v. United States,* 52 F. 3d 223, 225 (9th Cir. 1995). However, we have recognized limited exceptions to this rule where disclosure would compromise confidential communications between attorney and client or constitute the "last link" in an existing chain of evidence likely to lead to the client's indictment. *See id.* and 227 n.1; *Tornay v. United States,* 840 F.2d 1424, 1428 (9th Cir. 1988); *United States v. Gray,* 876 F.2d 1422, 1415-16 (9th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990).

As there is no evidence that any of Blackman's client's who may be implicated in this dispute are currently the subject of ongoing investigation, the district court correctly found that the last link doctrine does not apply.[2] *See Sepenuk,* 864 F.

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[2] Blackman relies on *United States v. Gertner*, 873 F.Supp. 729 (D. Mass. 1995) to support his argument that attorney-client privilege should apply in cases like his. Apart from the fact that the First Circuit refused to affirm this part of the district court's opinion, *see United States v. Gertner,* 65 F. 3d 963, 971-74 (lst Cir. 1995), the district court in *Gertner* expressly limited its holding on attorney-client privilege to those cases where "the IRS seeks disclosures regarding a client who is being represented on currently pending criminal charges and the disclosures agree likely to incriminate the client in that very proceeding." 873 F.Supp. at 737.

Supp. at 1006. As the district court went on to observe, the exception to the general rule that fee arrangements and fee-payer identity are not privileged has had a somewhat tortuous history in the jurisprudence of this circuit. *Id.* The earliest case to consider the exception is *Baird v. Koerner,* 279 F.2d 623 (9th Cir. 1960), applying California rather than federal law regarding attorney-client privilege, and finding client identity to be within the privilege where it tends to implicate the client in the very offenses for which he sought legal advice. *Id.* at 633.

In *United States v., Hodge & Zweig,* 548 F.2d 1347, 1353 (9th Cir. 1977), this court proposed that the exception as stated in *Baird* "also reflects federal law." Blackman relies heavily on these two cases, and their suggestion that identity information is privileged where it tends to "implicate" the fee-payer. However, as the district court noted, this definition of the exception has since been discredited within our circuit. *See Sepenuk,* 864 F. Supp. at 1006-07. We have repeatedly held that the attorney-client privilege does *not* apply where disclosure might incriminate the client or fee-payer, but *only* where it would convey information tantamount to a confidential communication. *See In re Ousterhoudt,* 722 F.2d 591, 593-94 (9th Cir. 1983); *In re Grand Jury Subpoenas v. Hirsch,* 803 F.2d 493, 497 (9th Cir. 1986), corrected 817 F.2d 64 (9th Cir. 1987); *Tornay*, 840 F.2d at 1427 (characterizing *Hodge & Zweig's* statement of *Baird* as dictum, and "giv[ing] it no precedential weight"); *Dole v.*

Milonas, 889 F.2d 885, 889 (9th Cir. 1989); *Ralls*, 52 F. 3d at 225.

In deciding whether either Sepenuk or Blackman had met his burden in establishing the applicability of the exception, the district court questioned whether it was appropriate to consider the *in camera* affidavits. In spite of its reservations, the court proceeded to review them. *See Sepenuk,* 864 F.Supp. at 1007. As a threshold matter, we observe that it *was* appropriate for the court to review these documents. See Clarke, 974 F.2d at 129; *Dole*, 889 F2d. at 890.

With reference to both Blackman and Sepenuk, the district court found, based in part on its review of the sealed affidavits, that the identity, fee arrangement and purpose information sought by the IRS was not privileged. *See Sepenuk,* 864 F.Supp. at 1007. The court denied as overbroad the IRS's request Number 4 calling for "'[a]ny other identifying date for the individual(s) or organization(s) who conducted the transaction(s) or for whom the transaction(s) was conducted.'" *Id.*

The district court specifically considered in its order Blackman's argument that two of the questioned transactions in his case did not involve fee arrangements. The court found as to the first non-fee related transaction that Blackman"has failed to establish that the transfer of funds related in any direct way to the purpose for which respondent was retained." As to the second, the court found that Blackman "has failed to

establish that the temporary transfer of funds to his account constitutes a "confidential' communication."

Based on his reading of *Baird* and progeny, Blackman argues that the district court misapplied the law. He states that because his receipt of the funds was "inextricably linked to the legal service his firm was retained to provide," the identity of the fee-payers and the services are privileged. Blackman is mistaken. As we stated in *Ralls*, "the correct test [] is whether the fee-payer's identity and the fee arrangements are so intertwined with confidential communications that revealingeither . . . would be tantamount to revealing a privileged communication." 52 F. 3d at 226.

Attorney Ralls was subpoenaed to provide information concerning the identity of fee-payer who retained him to defend a third party, where the fee-payer had advised Ralls of his involvement in the crime with which the defendant was charged. *Id.* at 225-26. We held that the fee arrangements and fee-payer's identity were therefore "inextricably intertwined with confidential communications" and protected by the attorney-client privilege. *Id.* at 226. No such fact pattern exists here.

The Second and Eleventh Circuits have held that, absent extraordinary circumstances, § 5060i does not conflict with traditional attorney-client privilege. *See United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504-05 (2d Cir. 1991); *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992) (following *Goldberger*). We agree. As several

courts have remarked, clients wishing to avoid disclosure are free to pay their counsel in some manner other than cash. *Goldberger*, 935 F.2d at 504; *Leventhal*, 961 F.2d at 941; *and see Ritchie,* 15 F. 3d at 601 (same; "there is no reason to grant law firms a potential monopoly on money laundering simply because their services are personal and confidential.") Attorneys should inform clients proferring cash in excess of $10,000 for fees that they will normally be obliged to disclose fee-payer identity and the nature of the fee arrangement in filing Form 8300.

The *Goldberger* court further suggested that even if a communication might technically fall within the scope of the attorney-client privilege, the privilege must yield where it "collides head on with a federal statute that implicitly precludes its application." 935 F.2d at 505; and *see Leventhal,* 961 F.2d at 940 (quoting *Goldberger* with approval). We need not consider whether §5060i "trumps" the attorney-client privilege, as the Government argues these cases hold. Our case law spells out the narrow circumstances under which fee-payer identity and fee arrangements may be protected by the attorney-client privilege. Only in the extremely rare case will the receipt of cash for fees be so intertwined with the subject of the representation as to obviate compliance with § 5060i. We are hard pressed to imagine such a case, and decline to provide an illustration.

We hold that Blackman has filed to establish that the circumstances involving the clients whose identities are at

stake here are such that disclosure of the information sought in conjunction with § 5060i would be "tantamount to [the revelation of] a confidential professional communication." *Tornay*, 840 F.2d at 1428.

3. Blackman's Fifth Amendment privilege

Courts have rejected the argument that completion by an attorney of Form 8300 violates the client's Fifth Amendment rights. *See Ritchie,* 15 F. 3d at 602; *Sindel,* 53 F. 3d at 877. The privilege against self-incrimination is personal, and applies only to compulsion of the individualholding the privilege. *Couch v. United States*, 409 U.S. 322, 328 (1973).

Blackman argues that his *own* Fifth Amendment rights are implicated, however, because he is the one being investigated. He avers the district court was mistaken in stating that only documents and not testimony is required of him, because the IRS petition refers to testimony as well as records. Blackman argues that under *Curcio v. United States,* 354 U.S. 118, 123-24 (1957), a custodian of records may not be compelled to condemn himself by his own oral testimony. He further claims, citing *Fisher v. United States,* 425 U.S. 391, 408 (1976) and *United States v. Doe,* 465 U.S. 605, 613 (1984), that even if testimony is not required, the very act of producing documents in this case would be incriminating because it would show that he had withheld information that was actually available to him. Blackman does not argue here

that the contents of the records are privileged under the Fifth Amendment.

Insofar as Blackman may be required to testify orally at a hearing pursuant to enforcement of the summons, his Fifth Amendment arguments premature. *United States v. Rendahl,* 746 F.2d 553, 555 (9th Cir. 1984) (a petitioner cannot invoke the privilege in appeal of summons enforcement order, but must wait until he appears before the IRS and raise the privilege with respect to questions asked or documents sought). Given the district court's denial of the IRS's request for "'[a]ny other identifying date for the individual(s) or organization(s) who conducted the transaction(s) or for whom the transaction(s) was conducted,'" *Sepenuk*, 864 F. Supp. at 1007, Blackman will likely be asked to testify for the limited purpose of identifying the records sought by the IRS. Under these circumstances, *Curcio* will not help him.

As the Supreme Court explained in *Braswell v. United States,* while *Curcio* drew a line between "oral testimony and other forms of incrimination" in holding that a custodian of records cannot be compelled to condemn himself by his own oral testimony in the absence of a grant of prosecutorial immunity, it distinguished "those cases in which a corporate officer was required to produce corporate records and merely identify them by oral testimony." *Braswell,* 487 U.S. 99, 114-15 (1988). "'Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself.'" *Id.*

(quoting *Curcio v. United States,* 354 U.S. 118, 125 (1957).

As for the documentary information sought by the IRS, the "collective-entity" rule preserved in *Braswell* nullifies Blackman's Fifth Amendment argument. *Id.* at 109. Partners in a law firm are included within the collective entity rule, *id.* at 108 (1988) (citing *Bellis v. United States,* 417 U.S. 85, 100 (1974)), "which declares simply that corporate records are not private and therefore are not protected by the Fifth Amendment." *Id.* at 109. A corporate custodian cannot claim a Fifth Amendment privilege with regard to corporate records, even if the records *or the act of producing them* might incriminate him personally. *Id.* at 111-12 (citing *Fisher v. United States,* 425 U.S. 391, 411 (1976)).

Because Blackman may not rely upon the privilege to avoid producing records belonging to his law firm, we hold that the Fifth Amendment does not preclude enforcement of the IRS summons.

4. Additional arguments

Finally, Blackman asserts that he wishes to "preserve [the following arguments] for possible later review"; 1) the practice of law is not a "trade or business" under I.R.C. § 6050I; 2) § 6050I unconstitutionally interferes with: a) the Sixth Amendment right to counsel; b) his clients' Fifth Amendment right to remain silent; c) attorneys' and clients' First Amendment rights of attorney and client; and d) his clients' due process rights. As Blackman concedes, all of these arguments have been rejected by the courts that have

considered them.

Because Blackman does not specifically argue any of these claims, we deem them waived and do not reach them. *Officers for Justice v. Civil Serv. Comm'n,* 979 F.2d 721, 726 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 1645 (1993).

For the foregoing reasons, the district court's order is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA; CHERYL J. BUTCHER, IRS Revenue Agent,	)	
Petitioners-Appellees	)	No. 94-35990
	)	D.C. No.CV 94-00757
v.	)	MFM
MARC D. BLACKMAN, personally and in his representative capacity as a partner of Ransom, Blackman & Weil, formerly known as Ransom, Blackman & Simson,	)	ORDER (Mar 13, 1996)
Respondent-Appellant.	)	

BEFORE: BROWNING, RYMER and T. G. NELSON, Circuit Judges.

The panel has voted to deny appellants petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA; CHERYL J. BUTCHER, IRS Revenue Agent,	)	
Petitioners-Appellees	)	No. 94-35990
	)	CT/AG#CV
	)	94-00757
v.	)	MFM
MARC D. BLACKMAN, personally and in his representative capacity as a partner of Ransom, Blackman & Weil, formerly known as Ransom, Blackman & Simson,	)	MANDATE
	)	(Mar 21,
	)	1996)
Respondent-Appellant.	)	

APPEAL FROM the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by the Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered December 29, 1995

Returns relating to cash received in trade or business, etc.

(a) Cash receipts of more than $10,000. Any person --

(1) who is engaged in a trade or business, and

(2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),

shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

(b) Form and manner of returns. A return is described in this subsection if such return--

(1) - is in such form as the Secretary may prescribe,

(2) contains--

(A) the name, address, and TIN of the person from whom the cash was received

(B) the amount of cash received,

(C) the date and nature of the transaction, and

(D) such other information as the Secretary may prescribe.

(c) Exceptions. (1) Cash received by financial institutions. Subsection (a) shall not apply to--

(A) cash received in a transaction reported under title 31, United States Code, if the Secretary determines

that reporting under this section would duplicate the reporting to the Treasury under title 31, United States Code, or

(B) cash received by any financial institution (as defined in subparagraphs (A), (B), (C), (D), (E), (F), (G), (J), (K), (R), and (S) of section 5312(a)(2) of title 31, United States Code).

(2) Transactions occurring outside the United States. Except to the extent provided in regulations prescribed by the Secretary, subsection (a) shall not apply to any transaction if the entire transaction occurs outside the United States.

(d) Cash includes foreign currency and certain monetary instruments. For purposes of this section, the term 'cash' includes--

(1) foreign currency, and

(2) to the extent provided in regulations prescribed by the Secretary, any monetary instrument (whether or not in bearer form) with a faced amount of not more than $10,000.

Paragraph (2) shall not apply to any check drawn on the account of the writer in a financial institution referred to in subsection (c)(1)(B).

(e) Statements to be furnished to persons with respect to whom information is required. Every person required to make a return under subsection (a) shall furnish to each person whose name is required to be set forth in such return a written statement showing--

(1) the name and address of the person required to make such return, and

(2) the aggregate amount of cash described in subsection (a) received by the person required to make such return.

The written statement required under the preceding sentence shall be furnished to the person on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made.

(f) Structuring transactions to evade reporting requirements prohibited. (1) In general. No person shall for the purpose of evading the return requirements of this section--

(A) cause or attempt to cause a trade or business to fail to file a return required under this section,

(B) cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact, or

(C) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more trades or businesses.

(2) Penalties. A person violating paragraph (1) of this subsection shall be subject to the same civil and criminal sanctions applicable to a person which fails to file or completes a false or incorrect return under this section.

(g) Cash received by criminal court clerks. (1) In general. Every clerk of a Federal or State criminal court who

receives more than $10,000 in cash as bail for any individual charged with a specified criminal offense shall make a return described in paragraph (2) (at such time as the Secretary mayby regulations prescribe) with respect to the receipt of such bail.

(2) Return. A return is described in this paragraph if such return--

(A) is in such form as the Secretary may prescribe, and

(B) contains--

(i) the name, address, and TIN of--

(I) the individual charged with the specified criminal offense, and

(II) each person posting the bail (other than a person licensed as a bail bondsman),

(ii) the amount of cash received,

(iii) the date the cash was received, and

(iv) such other information as the Secretary may prescribe.

(3) Specified criminal offense. For purposes of this subsection, the term "specified criminal offense" means--

(A) any Federal criminal offense involving a controlled substance,

(B) racketeering (as defined in section 1951, 1952, or 1955 of title 18, United States Code),

(C) money laundering (as defined in section 1956 or 1957 or such title), and

(D) any State criminal offense substantially similar to an offense described in subparagraph (A), (B), or (C).

(4) Information to federal prosecutors. Each clerk required to include on a return under paragraph (1) the information described in paragraph (2)(B) with respect to an individual described in paragraph (2)(B)(i)(I) shall furnish (at such time as the Secretary may by regulations prescribe) a written statement showing such information to the United States. Attorney for the jurisdiction in which such individual resides and the jurisdiction in which the specified criminal offense occurred.

(5) Information to payors of bail. Each clerk required to make a return under paragraph (1) shall furnish (*at such time as the Secretary may by regulations prescribe) to each person whose name is required to be set forth in such return by reason of paragraph (2)(B)(i)(II) a written statement showing--

(A) the name and address of the clerk's office required to make the return, and

(B) the aggregate amount of cash described in paragraph (1) received by such clerk.

Or. Rev. Stat. § 9.460

Duties of attorneys. An attorney shall:

(1) Support the Constitution and laws of the United States and this state;

(2) Maintain the respect due to courts and judicial officers;

(3) Counsel and maintain such actions, suits, or proceedings or defenses only as may appear to the attorney legal and just, except the defense of a person charged with a public offense;

(4) Employ, for the purpose of maintaining the causes confided to the attorney, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of law or fact;

(5) Maintain inviolate the confidence, and at every peril to the attorney, preserve the secrets of the clients of the attorney;

(6) Abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which the attorney is charged;

(7) Not encourage the commencement or continuation of an action, suit or proceeding from any motives of passion or interest; and

(8) Never reject, for any personal consideration, the cause of the defenseless or the oppressed.

STEPHEN G. FUERTH
Chief, Civil Trial Section
Western Region, Tax Division
W. Carl HANKA
Trial Attorney, Tax Division
U.S. Department of Justice
PO Box 683
Ben. Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-6448

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF OREGON

UNITED STATES OF AMERICA and CHERYL J. BUTCHER, Internal Revenue Service Agent,	)	Civil No. 3:94-20-PA
Petitioners,	)	DECLARATION OF CHERYL J. BUTCHER
v.	)	
MARC D. BLACKMAN, personally and in his representative capacity as a partner of Ransom, Blackman & Weil, formerly known as Ransom, Blackman & Simson,	)	
Respondent.	)	

I, CHERYL J. BUTCHER, declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a duly commissioned Revenue Agent employed in

the Examination Division of the Office of the District Director of Internal Revenue, Portland, Oregon. As a Revenue Agent I am authorized to issue summons pursuant to section 7602 of the Internal Revenue Code of 1986 (26 U.S.C. hereinafter "the Code").

2. In my capacity as a Revenue Agent, I am investigating the respondent's compliance with section 6950I of the Code with respect to the years 1987 to 1991 inclusive. In that connection, I am seeking to (1) ascertain the correctness of the incomplete Form 8300 information returns described below; (2) make Forms 8300, if necessary, where none have been filed; and (3) determine the liability, if any, of the respondent for penalties imposed pursuant to sections 6721 through 6723 of the Code.

3. Section 6050I of the Code requires "[a]ny person (1) who is engaged in a trade or business, and (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions)" to file an information return, disclosing, among other things, "(A) the name, address and TIN [taxpayer identification number] of the person from whom the cash was received, (B) the amount of cash received, (C) the date and nature of the transaction, and (D) such other information as the Secretary may prescribe."

4. Section 1.6050I-1 of the Treasury Regulations on Income Tax (26 C.F.R.) requires the foregoing information to be reported on a Form 8300 ("Report of Cash Payments Over

$10,000 Received in a Trade or Business"). The Form 8300 is required to be filed with the Internal Revenue Service within 15 days after receipt of the requisite cash payment(s).

5. As a part of my investigation, on July 7, 1992, I issued a Form 2039 Internal Revenue Service summons (hereinafter "the Summons") to the respondent with respect to Forms 8300 filed with respect to the period in question. The Summons directed him to appear before m on August 19, 1992, at 1220 S.W. Third Avenue, Room 721, Portland, Oregon, to give testimony and to produce certain books, records, papers, and other data as stated in the Summons. A true and correct copy of the Summons is attached hereto as Exhibit A.

6. On July 7, 1992, I served the Summons by personally handling an attested copy thereof to the respondent, as is evidenced by the Certificate of Service thereon.

7. On August 19, 1992, the respondent failed and, to date, has continued to fail to give testimony and to produce the books, records, papers, and other data as requested by the Summons.

8. The information and the books, records, papers and other data sought by the Summons are not already in the possession of the Internal Revenue Service.

9. The testimony, books, records, papers and other data described and demanded by the Summons are necessary to conduct the above-described investigation properly. They may be relevant or material to (1) ascertain the correctness of the Forms 8300 attached to the Summons; (2) make Forms 8300,

if necessary, where none have been filed; and (3) determine the liability, if any, of the respondent for penalties imposed pursuant to sections 6721 through 6723 of the Code.

10. All administration procedures required by the Code for issuance of the Summons have been followed.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED this 22nd day of December, 1993.

/s/ Cheryl J. Butcher
CHERYL J. BUTCHER
Revenue Agent
Internal Revenue Service

[EXHIBITS OMITTED]

IN THE UNITED STATES DISTICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA and CHERYL J. BUTCHER, Internal Revenue Service Revenue Agent,	)
Petitioners,	) Misc. No.94-20MA
v.	) PUBLIC
MARC D. BLACKMAN, personally and in his representative capacity as a partner of Ransom, Blackman & Weil, formerly known as Ransom, Blackman & Simson,	) AFFIDAVIT) OF MARC D.) BLACKMAN
Respondent.	)

STATE OF OREGON)
) ss.
County of Multnomah)

I, MARC D. BLACKMAN, being first duly sworn, do hereby depose and say that:

1. I am the Respondent in the above-captioned case. I was admitted to and have been a member of the Oregon State Bar since 1973. I attended Harvard College, graduating in 1969. I received a Juris Doctor degree from the Yale Law School in 1973. Following law school, I served for one year as law clerk to the Hon. Kenneth J. O'Connell, who was then the Chief Justice of the Oregon Supreme Court. From the fall of 1974 to the spring of 1978 I was an Assistant

United States Attorney for the District of Oregon. I have been in private practice since that time as a member of the firm now known as Ransom, Blackman & Weil. I am a member of the Oregon Criminal Defense Lawyers Association and the immediate-past president of the Multnomah Bar Association.

2. In addition to being licensed to practice law in the state of Oregon, I am admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit, the United States District Courts for the Districts of Oregon and Arizona, and the United States Court of Claims and Tax Court.

3. This affidavit is made as part of the response to the Order to Show Cause issued by the Court on February 10, 1994 and served on me on February 23, 1994.

4. My substantive response to the Order to Show Cause issued by the Court on February 10, 1994 and served on me on February 23, 1994 is set forth in a second affidavit of this date which I am filing with the Court UNDER SEAL, *in camera* and on an *ex parte* basis. Given the nature of this proceeding,the directions contained in said Order, and the consequences that said Order asserts would flow from a failure to demonstrate the existence of "questions of material fact," I conclude that I am compelled to provide the Court with at least a summary substantive response regarding the facts underlying this proceeding. Doing so necessarily requires me to make certain disclosures that under other circumstances might be deemed a waiver of the very rights and privileges that the

actions giving rise to this proceeding were taken to protect. I expressly assert, therefore, that the disclosures contained in the second affidavit of this date are made solely to preserve and protect those rights and privileges, that such disclosures are intended to be for the Court alone, and that only so much has been disclosed as to demonstrate as a factual matter that cause exists why the internal revenue service summons in question should not be enforced. Other than to review said affidavit to satisfy itself that such "questions of material fact" indeed exist, the Court is respectfully requested to retain the second affidavit and its contents UNDER SEAL and *in camera* and not disclose them to any third party, including but not limited to representatives or agents of the Government. The Court is further requested to give counsel for Respondent at least ten days written notice of any intent to make any disclosure of any of the contents of said second affidavit to anyone else.

5. I make this affidavit to give the court a more complete procedural history of this matter and to correct what I believe to be erroneous representations made by Petitioners in the Petition to Enforce Internal Revenue Summons and the Declaration of Cheryl Butcher submitted in support thereof.

6. The Forms 8300 to which this proceeding relate were filed in 1987, 1988 and 1991. The Summons which the Government is asking the Court to enforce is not the first issued to Respondent regarding such forms. On the contrary, although the Government fails to so inform the Court

in its Petition, Respondent was first Summoned with respect to the forms filed in 1987 and 1988 on April 11, 1990. A copy of that Summons is appended hereto as Exhibit 1 and hereby incorporated by reference. On May 14, 1990 Respondent duly appeared as required by said Summons and orally informed Petitioner's representatives [Schultz and Evans] that no substantive response would be made for the following reasons:

a. The summons was overbroad and not authorized by law or regulation;

b. The summons violated an Oregon attorney's statutory duty to "maintain inviolate the confidence, and at every peril to the attorney, preserve the secrets of the clients of the attorney;" ORS 9.460(4); *State v. Waller,* 307 OR 575 (1990);

c. The summons invaded the attorney-client privilege and sought to compel the attorney to provide the "last link in the chain" that could subject the client to adverse governmental actions;

d. The summons invaded the attorney work-product privilege;

e. The attorney's privilege against self-incrimination precluded the government from securing the information sought by the summons from a participant to the transaction requiring the filing of the Form 8300.

Appended to this affidavit as Exhibit 2 and hereby incorporated by reference are my file notes of the appearance on May 14, 1990 during which I made these responses to Petitioners' representatives.

7. Following my appearance on May 14, 1990, no action was taken by Petitioners or anyone else to obtain the information sought by the April 11, 1990 Summons or to enforce it. By July, 1991 I had concluded that Petitioners recognized the validity of the position I had taken on May 14, 1990 and that under the law of Oregon, especially as ORS 9.460(4) had been construed in *Waller, supra*, an attorney simply was precluded by law from providing the the Government with such information. In reliance on the Government's inaction, I thereafter participated in the transaction of July 9, 1991 which is included in those covered by the Petitioners' Petition to Enforce Internal Revenue Summons.

8. On July 7, 1992, I was served with a second summons, the one which Petitioners seek to have enforced through this proceeding, requiring me to appear on August 19, 1992. Contrary to the assertion contained in the Declaration of Cheryl J. Butcher submitted by Petitioners to the Court in support of their request that an Order to Show Cause be issued that on that date I"failed and, to date ha[ve] continued to fail to give testimony and to produce the books, records, papers, and other data as requested by the Summons, " I in fact appeared and again informed the IRS representatives present [as I had in 1990] that I was providing them with all the information and"papers" I was allowed by law to release. Appended to this affidavit as Exhibit 3 and hereby incorporated by reference is a copy of my August 18, 1992

letter to Ms. Butcher setting forth this information. It sets forth the grounds upon which I then relied and on which I continue to rely in refusing to provide further information to Petitioners.

9. Following my appearance on August 19, 1992, Petitioners again took no action either directly or through anyone else to obtain the information sought by the July 7, 1992 Summons or to otherwise enforce it until this action was filed on February 10, 1994. On the contrary, on October 5, 1992 I received a "Dear " letter from a representative of the Internal Revenue Service regarding the same Form(s) 8300. This letter provided, in part:

> . . . please provide the information requested . . . within 30 calendar days . . . . Your failure to submit the requested information will result in the referral of this matter to your local district office for issuance of a summons to obtain the information.

A copy of this letter is appended hereto as Exhibit 4 and hereby incorporated by reference. A copy of my October 13, 1992 response is appended hereto as Exhibit 5 and also so incorporated. No summons has been served on me since October 5, 1992.

10. Given the circumstances described in the second affidavit of this date which is filed UNDER SEAL, *in camera* and on an *ex parte* basis and for the reasons outlined in Respondent's Memorandum in Support of Showing Why Internal Revenue Service Summons Should not be Enforced which is being filed contemporaneously herewith, Respondent

respectfully submits that the Court should dismiss Petitioners' Petition to Enforce Internal Revenue Summons, find that cause indeed exists why said summons should not be enforced, and that Respondent has established that "questions of material fact" are present that preclude the court from granting Petitioners any of the relief they seek.

Dated this 23d day of May, 1994.

Respectfully submitted,

_____

MARC D. BLACKMAN

SUBSCRIBED AND SWORN to before me this 23d day of May, 1994.

_____

Mary Theresa Villereal
Notary Public for Oregon
My Commission Expires: 7-18-95

[EXHIBITS OMITTED]